IN THE SUPREME COURT OF THE STATE OF DELAWARE

ELLEN B. LYNCH, CHARLOTTE McDANIEL, BETTY NAILOR, BOB S. BURTON, JOHN S. BURTON, FRED S. BURTON, LESTER LEE NAILOR, MARY LOU JACKSON, JUANITA WATKINS, LAURA NAILOR, GREG NAILOR, DAVID NAILOR, SAMUEL SIMPSON, AND AMELIA A. BURTON, BY ELLEN B. LYNCH, her attorney-in-fact,	)	No. 424, 2005
	)	Court Below: Chancery Court of the State of Delaware in and for Sussex County
	)	C.A. No. 2266
Plaintiffs Below, Appellants,	)	
v.	)	
THE CITY OF REHOBOTH BEACH, a Municipal corporation of the State of Delaware, THE COMMISSIONERS OF REHOBOTH BEACH, the governing Body of The City of Rehoboth Beach, SAMUEL R. COOPER, et al,	)	
Defendant Below, Appellee,	)	
And	)	
GREGORY L. KUNDINGER, et al,	)	
Additional Defendants Below, Appellees.	)	

Submitted: February 1, 2006
Decided: March 7, 2006

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

O R D E R

This 7th day of March 2006, it appears to the Court that:

1. This appeal arises from the rezoning of plaintiffs'/appellants'[1] property in the City of Rehoboth Beach from commercial to residential. Appellants assert that the Chancellor committed several errors, namely: (1) by holding that the City, as the proponent of the rezoning, did not have an affirmative burden of proof; and, (2) by finding that the decision to rezone appellants' lots was consistent with the City's 1996 Comprehensive Plan. We conclude that even if the City had the burden of proof, the record demonstrates that the City met its burden. Further, because the City presented substantial evidence that the rezoning conformed to the 1996 Comprehensive Plan, we AFFIRM.

2. On December 2, 2002, the Commissioners of Rehoboth Beach resolved to hold a public hearing to consider rezoning ten lots in the City from a zoning classification of C-3 commercial to R-2 residential.[2] Appellants own five

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[1] Plaintiffs/Appellants in this matter are Ellen B. Lynch, Charlotte McDaniel, Betty Nailor, Bob S. Burton, John S. Burton, Fred S. Burton, Lester Lee Nailor, Mary Lou Jackson, Juanita Watkins, Laura Nailor, Greg Nailor, David Nailor, Samuel Simpson, and Amelia A. Burton, by Ellen B. Lynch, her attorney-in-fact (collectively, the "appellants").

[2] The resolution passed following two hearings (on November 14 and 16, 2002) on a new Comprehensive Plan("2002 Comprehensive Plan"). The 2002 Comprehensive Plan also called for the rezoning of the same properties from commercial to residential and called the initiative "the most pressing current land use issue." Several of the appellants or their representatives attended the November hearings, and one appellant, Lynch, wrote to the Planning Commission opposing the plan. Ninety percent of the comments received by the Planning Commission on the draft Comprehensive Plan supported the reclassification of the lots. However, the 2002 Comprehensive Plan itself is not an issue here because the City decided to adopt the challenged

of those ten lots. On January 18, 2003, the Commissioners heard seven hours of testimony on the proposed rezoning from members of the Planning Commission, neighbors in support of and against the proposal, and several of the appellants.

3. On February 18, 2003, the Commissioners reconvened to consider and vote on the rezoning. Before the Commission voted, the following exchange between Commissioner Derrickson and City Solicitor Speakman took place:

> Commissioner Derrickson: "The rezoning of the property to me is an uphill. The person asking for the rezoning has the burden, to me."
>
> Solicitor Speakman: "In rezoning law, the legislative body is presumed to be valid unless it's clearly shown the rezoning was not reasonably related to the public health and welfare. And so the burden is on those protesting the rezoning to show that the Commissioners' decision was arbitrary and capricious. So legally the burden is on – I understand you may be meaning something else, but I wanted to just – it gave me an opening, and I wanted to make sure I said that." [3]

4. After debating the issue and making additional factual findings, the Commissioners voted 6 to 1 to rezone the property to conform to the Comprehensive Plan of 1996. Appellants filed for injunctive relief against the

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zoning ordinance before the 2002 Plan took effect. Thus, the 1996 Comprehensive Plan was in effect at the time the ordinance rezoned the properties. Therefore, we review the ordinance under the 1996 Comprehensive Plan.

[3] We find the City Solicitor's statement, at least as recorded, to be virtually incomprehensible. We understand it to mean that the legislative act establishing the 1996 Comprehensive Plan is presumed to be valid. We interpret his statement to be: that in order to challenge the proposed rezoning of the 5 lots, the appellants below would have to show that the Commissioner's original decision adopting the Comprehensive Plan with which the current zoning is inconsistent was arbitrary and capricious and that the pending "down" zoning of their lots to conform to that Plan would therefore be improper.

rezoning in the Court of Chancery. The Master in Chancery issued his final Report on April 21, 2005, based on cross motions for summary judgment, and found in favor of the appellees.[4] Appellants filed three exceptions to the Report. The Chancellor denied all three exceptions and affirmed the Master's final Report.[5] Appellants have appealed the Chancellor's ruling.

5. Appellants first claim that the City Solicitor incorrectly instructed the Commissioners on the law when stating that the party opposing the rezoning had the burden of proof. Appellants argue that because that incorrect instruction improperly influenced the Commissioners' votes, we must reverse the decision below. Whether the City, as the proponent of the rezoning, had any affirmative burden of proof is a question of law that we review *de novo*.[6]

6. A city council has no "inherent power to regulate land use in the [city]. That power is part of the sovereign power of the State which is delegated by statute."[7] The statute, subject to conditions stated within the chapter, provides that

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4 *Lynch v. City of Rehoboth*, 2005 WL 1074341 (Del. Ch. Apr. 21, 2005).

5 *Lynch v. City of Rehoboth*, 2005 WL 2000774 (Del. Ch. Aug. 16, 2005).

6 *Merrill v. Crothall-American Inc.*, 606 A.2d 96, 100 (Del. 1992).

7 *Lawson v. Sussex County*, 1995 WL 405733 at *4 (Del. Ch. Jun. 14 1995)(citing *County Council v. Green*, 516 A.2d 480 (Del. 1986)("County Council does not have a free hand to grant rezoning upon request. It must conform with standards established by the General Assembly.")).

The State grants zoning power to the counties through 9 *Del.C.* Ch. 26, 48 & 69. That same zoning power is delegated to other municipalities (*i.e.*, cities and towns) by 22 *Del.C.* Ch. 3.*See also O'Neill v. Town of Middletown*, 2006 WL 205071 at *31 n.270 (Del. Ch. Jan. 18, 2006).

the legislative body of cities and incorporated towns may regulate land use.[8] Among the conditions are the requirements that "regulations shall be made in accordance with a comprehensive plan and designed to… promote the health and general welfare…."[9]

7. Appellants do not challenge the validity of the process for or adoption of the 1996 Comprehensive Plan. What appellants contend is that when the proposed ordinance rezoning their property came before the Commissioners for action, the City had "an affirmative burden of proof." Appellants do not clearly articulate what that "affirmative burden of proof" was. We understand their position to be that the City had the "affirmative burden" to demonstrate that the new ordinance that would "down" zone their property was consistent with the 1996 Comprehensive Plan and would promote the health and general welfare of the citizens of Rehoboth. Further, appellants argue that the only relevant presumption of validity would be a presumption that attaches to the current zoning classification or the 1996 Comprehensive Plan, but not to the proposed rezoning initiated by the City.

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[8] 22 *Del. C.* §301. For a similar discussion of a county's power to zone under title 9, S*ee Lawson*, 1995 WL 405733 at *4 ("The county government may, in accordance with the conditions and procedures specified in this subchapter regulate land use. Among the conditions set forth in the subchapter is the requirement that regulations adopted by the county government shall be in accordance with the approved comprehensive development plan") (internal citations and quotations omitted).

[9] 22 *Del. C.* §303.

8. The Chancellor held that "the only 'burden' the Commissioners have, while acting in their legislative capacity, is to determine if the rezoning is in the interests of health, safety and welfare of the community."[10] We decline to address whether the City had "an affirmative burden" of a different kind because it is not necessary to our holding today. For the sake of argument, we will assume that the City did at least have "an affirmative burden" of going forward by producing evidence that demonstrated that the proposed ordinance "down" zoning the properties was consistent with the 1996 Comprehensive Plan and promoted the health and general welfare of the citizens of Rehoboth. We also will assume, for the sake of argument, that the City Solicitor misstated the law.[11] Based on these assumptions, we must determine: (1) whether the City met its assumed "affirmative burden;" and, (2) whether the City Solicitor's unclear, if not inaccurate, statements improperly influenced the Commissioners' votes.

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[10] *Lynch v. City of Rehoboth*, 2005 WL 2000774, at *3 (Del. Ch. Aug. 16, 2005) (citing *Tate v. Miles*, 503 A.2d 187, 191 (Del. 1986) and *Willdel Realty, Inc. v. New Castle County*, 281 A.2d 612, 614 (Del. 1971)).

[11] 22 *Del. C.* §303 requires regulations adopted by the city to be in accordance with the existing comprehensive plan and be designed to promote the health and general welfare of the community. In other words, if these two requirements are necessary for the adoption of a zoning ordinance, it seems reasonable to require the proponent of the zoning, in this case the City, to provide evidence that these conditions are met. In fact, in the recent case *O'Neill v. Town of Middletown*, 2006 WL 205071 at *37-36, the Vice Chancellor found a zoning ordinance invalid because the Town failed to provide "substantial evidence" that the ordinance was consistent with the comprehensive plan.

9. After a seven hour hearing, the Commissioners weighed testimony from both sides, and ultimately voted in favor of the application to rezone, finding that:

> [T]he rezoning **would have a beneficial impact on the health, safety and welfare of the City**; would moderate traffic and parking congestion; would prevent high-density development and preserve the residential characteristics of the area; would prevent impedance [*sic*] of the distribution of light and air; and that commercial development of the parcels in question would have a negative effect on adjoining residential areas and that rezoning **conformed to the then-effective 1996 Comprehensive Plan**.[12]

10. Based on the above quoted language, it is clear that the Commissioners articulated findings that supported their conclusion that the proposal conformed to the 1996 Comprehensive Plan and promoted the health and general welfare of the citizens of Rehoboth Beach. As the Master and the Chancellor both found, we also conclude that substantial evidence in the testimony supported the Commissioners' conclusion.

11. Appellants also contend that the City Solicitor's statement improperly influenced the Commissioners' votes, because it erroneously allocated the burden of proof to appellants to rebut a "presumption" that the proposed rezoning was valid. Appellants liken the City Solicitor's alleged misstatement of the law to a legally erroneous jury instruction that requires reversal where shown to have

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[12] *Lynch v. City of Rehoboth*, 2005 WL 1074341, at *5 (Del. Ch. Apr. 21, 2005) (reviewing the factual findings made by the Commission in the motion to rezone).

improperly influenced the jury. Under Delaware case law, a verdict based on an erroneous jury instruction must be reversed only if the instruction undermined the jury's ability to perform its duty intelligently.[13]

12. Applying that standard, we conclude that the appellants have failed to show that any alleged misstatement by the City Solicitor undermined the Commission's ability to perform its duty.[14] In fact, the above-cited findings by the Commission indicate the contrary. The Commission appropriately considered the general health, safety, and welfare of the community, and as discussed in more detail below, also found that the new zoning ordinance conformed to the 1996 Comprehensive Plan. No Commissioner ever indicated confusion about or mentioned the City Solicitor's statement before voting for the motion to rezone.[15] We conclude that the City met its only burden by presenting evidence that enabled the Commission to find facts, and reach a logical conclusion based on those facts, addressing the legal requirement for a rezoning. We regard the City Solicitor's statement to be no more than a reminder that the 1996 Comprehensive Plan was

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[13] *Asbestos Litig. v. Owens-Corning*, 669 A.2d 108, 113 (Del. 1995).

[14] Appellants practically concede this point in their brief: "[t]here is absolutely no way to know whether the Commissioners and the Mayor voted as they did because the Solicitor misapprehended the burden of proof issue in communicating with the Commissioners just prior to their vote."

[15] It is worth noting that the City Solicitor's statement responded to Commissioner Derrickson. Because the alleged misstatement was intended to respond to Derrickson, one could reasonably assume that the alleged misstatement might have affected Derrickson's vote. Derrickson, however, voted against the proposed rezoning ordinance.

presumed valid and that if the findings, based on the record made at the hearing logically supported a conclusion that the proposed rezoning conformed to the 1996 Comprehensive Plan and promoted the health and general welfare, then the Commissioners would have met the legal burden necessary to adopt the ordinance rezoning the lots. The City Solicitor's statement did not undermine the Commission's ability to perform that duty.

13. Appellants' final claim is that the Chancellor erred by finding that the decision to rezone these properties was consistent with the 1996 Comprehensive Plan. In reviewing the Chancellor's holding that the rezoning conforms to the City's Comprehensive Plan, we replicate the role of the Chancellor, and review the Commissioners' finding that the rezoning conformed to the Plan under the substantial evidence test.[16] "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[17] We do not weigh evidence, resolve questions of credibility or make our own factual findings.[18]

14. The 1996 Comprehensive Plan stated: "Residential areas that are partially commercialized, commercial areas that are zoned but not developed, and

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16 *See Scheers v. Indep. Newspapers*, 832 A.2d 1244, 1246 (Del. 2003).

17 *Id.* at 1246-47.

18 *Id.* at 1247.

commercial areas developed as residential should be examined for rezoning." The Commissioners made an express finding that the appellants' property fell into those categories and was subject to review consistent with the 1996 Comprehensive Plan.

15. Although appellants presented testimony that their property has always been zoned as commercial property, the Commissioners also heard substantial testimony from others that appellants' property was located in a residential area, or within a residential area that was partially commercialized, and that further commercial development would be harmful to that area.[19] Therefore, the Commission's conclusion that the rezoning was consistent with the 1996 Comprehensive Plan was supported by substantial evidence.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Court of Chancery is **AFFIRMED**.

BY THE COURT:

/s/ Myron T.Steele
Chief Justice

[19] *See*, *e.g.*, the testimony of Richard Rouf, Stephen Cochran, Nancy Marin, Tim Spiez, Gail Fitzgerald, Matt Gafney, Betsey Edgeworth, Peter Berkman, Greg Kundinger, Deborah Nerich, and Andrea Hoffman.